93-54

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GLORIA KELLEY, EX-EMPLOYEE,
PETITIONER (PRO SE)

VS.

KIRKPATRICK & LOCKHART, a professional association consisting of partners engaged in the practice of law, BRIAN FOREMNY, Partner, Individually and as agent of KIRKPATRICK & LOCKHART, REGINA MARCH, Office Administrator, individually and as agent of KIRKPATRICK & LOCKHART, jointly and severally,

EX-EMPLOYER, Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GLORIA KELLEY, PRO SE
10564 S.W. 112 Avenue
Miami, Florida 33176
Tel. No. (305) 279-5785

Gloria Kelley

58 pp

QUESTIONS PRESENTED:

I

Can Two People Married to Different Spouses And Engaged in An Unprofessional Relationship With Each Other In The Workplace, And Acting Outside The Scope Of Their Employment, Hide Behind The "Employer Shield" To Violate My Rights As follows:

A) My Constitutional Right To Earn A Living;

B) My Constitutional Right Of Freedom Of Speech Exercised In Response To The Infliction Of Psychologically Abusive Behavior Upon Me;

C) My Right To Be Free from Discrimination Under The Americans With Disabilities Act of 1990 ("ADA")?

II

Can Respondents And Their Attorneys Seek Refuge Behind Bad-Faith Acts, Harassing Tactics and Sham Pleadings/Motions When Confronted With The Evidence Supporting The Truth And Substance Of The Matter?

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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM 1992

GLORIA KELLEY, EX-EMPLOYEE, Petitioner

vs.

KIRKPATRICK & LOCKHART, a professional association consisting of partners engaged in the practice of law, BRIAN FOREMNY, Partner, individually and as agent of KIRKPATRICK & LOCKHART, REGINA MARCH, Office Administrator, individually and as agent of KIRKPATRICK & LOCKHART, jointly and severally,

EX-EMPLOYER, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE 11TH CIRCUIT

I, ("Petitioner"), respectfully pray that a writ of certiorari issue to review the Order of Dismissal for failure to state a cause of action entered by the United States District Court on June 8, 1992. The dismissal is in conflict with several U.S. Supreme Court decisions as well as 11th Circuit Court of Appeals decisions and decisions of other

circuits.

OPINIONS BELOW

The opinions at issue are unreported.

JURISDICTION

This action was dismissed for failure to state a cause of action on June 8, 1992 (App. C, a13). The Court of Appeals affirmed the dismissal on March 30, 1993 (App. D, a15-a17). A timely Petition for rehearing was filed on April 7, 1993. The Court of Appeals denied the Petition for Rehearing on May 13, 1993 (App. E, a18-a19). This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C.A., Section 1983 (App. F, a20); American With Disabilities Act of 1990 (App. G, a21-a28), which is supported by Section 11-A of the Dade County Code, as Amended (App. H, a29-a33).

STATEMENT OF THE CASE

The U.S. District Court has jurisdiction pursuant to: violation of freedom of speech,

diversity jurisdiction, and violation of the Americans With Disabilities Act of 1990 ("ADA") which is supported by Section 11-A of the Dade County Code, as Amended.

I filed this case in the United States District court for the Southern District of Florida on October 10, 1991, after the attorneys acted in bad faith and refused to settle with me despite the fact that I provided them with all of my exhibits supporting my claim of discriminatory and retaliatory discharge.

I have been a legal secretary/paralegal for over fifteen (15) years. I am very familiar with the attorneys' harassing and dilatory tactics. I knew from the beginning that they were going to engage in these harassing and dilatory tactics to deny me access to the courts. Therefore, I fought their every attempt at obstructing justice by memorializing my entire case through my responses to their harassing motions. I could not afford to forget the details of the case through the passage of

time and fading memories.

On January 31, 1992, the Magistrate entered his order denying all my motions (App. A, a1-a3), and entered his Report and Recommendation to dismiss for failure to state a cause of action (App. B, a4-a12). On February 8, 1992, I filed my objections to the Report and Recommendation of the Magistrate. On June 8, 1992, the District Court issued its Order of Dismissal adopting and accepting the Magistrate's recommendation, overruling my objections (App. C, a13-a14).

On June 15, 1992, I timely filed my notice of appeal to the Court of Appeals of the 11th Circuit. I timely filed by brief on September 4, 1992. Appellants refused to respond to the brief. Instead they filed an "Initial Brief of Appellees" which repeated the contents of their motion to dismiss and bad-faith affidavit. The U.S. Court of Appeals for the 11th Circuit affirmed the dismissal on March 30, 1993 (App. D, a15-a17) and it denied a rehearing on May 13,

1993 (App E, a18-a19).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: A) the questions presented are of exceptional importance; and B) the order of dismissal is in direct conflict with precedents of the Supreme Court and the Court of Appeals for the 11th Circuit and other Circuits.

I

I worked for Kirkpatrick & Lockhart ("K&L") from February 1987 to April 12, 1991. Regina March ("Regina") and Brian Foremny ("Brian") were married to different spouses, and they were involved in an unprofessional relationship with each other. Their relationship made the workplace a very hostile environment due to the power plays between them. I worked for Mark D. Cohen, an associate, and was later also assigned to work for Brian. Mark Cohen ("Mark") reacted with anger and resentment. He said that I was his secretary and I was being taken away from him. He then said "of course, since Brian is

her lover, she is going to make sure she takes care of him." The work situation became very strained. Additionally, the workload increased tremendously until it became apparent to both Mark and Brian that each one needed a full time secretary. Brian showed his resentment by telling me to bill the overtime to "administration because of the way this firm is run." I started to fall behind in my work. The hostile working environment combined with the excessive workload made me sick. I began having breathing difficulties to the point that I almost collapsed. I was diagnosed with a heart murmur and was put on medication.

When I received my performance review, I responded explaining why I was falling behind. Regina tore it up in front of me and told me that she was not going to put it in my personnel file. That's why I never signed her performance review. She then began to harass me by dumping more work on me. I was desperate. I needed my job because my husband was unemployed. I could

not understand why Regina was dumping more work on me since I had already been asking for help with my present workload. I then asked her why she was using me as her "punching bag." She was furious and that's when she used her illegitimate power obtained through her unprofessional relationship to pressure upper management to effect my dismissal; thus, violating my freedom of speech.

Both Regina and Brian told me that I was being dismissed because the job was too stressful for me and I had to take medication; thus violating the Americans with Disabilities Act of 1990 and Section 11-A of the Dade County Code which was in effect at the time of the dismissal.

Harvey Ziegler ("Harvey"), senior partner, and who has since left the firm, stood up for me. He told me that I was a "casualty of their affair." He did everything in his power to try to overturn the decision but was unsuccessful. He spoke to Jeffrey A. Tew ("Jeffrey"), managing

partner, who is also involved in an unprofessional relationship with his secretary, Joanne Brandt, for about 18 years. This fact was unbeknownst to Harvey. It is rumored that Joanne's son is Jeffrey's son.

Harvey also told me that he was told that in Florida employers can fire employees at will; thus, under the color of statute, they violated my constitutional right to earn a living in violation of the Civil Rights Act, 42 U.S.C.A. Sec. 1983. I had above average reviews and I was never reprimanded nor put on probation.

All of the foregoing is memorialized in the exhibits which I attached to the demand letter and to the Complaint, and in the entire record, including my motion for summary judgment filed with the Appeals Court. Such motion was denied.

II

I wanted to put this dispute behind me quickly. In the interest of judicial economy and in a good-faith attempt to settle out of court, I provided Respondents with all my

exhibits so that they could see that I had a legitimate claim. Respondents acted in bad faith, engaged in harassing tactics through their abuse of judicial process, and affixed their signature on sham pleadings/motions fully knowing that they were false and submitted in bad faith.

In Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the Supreme Court ruled that

> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of her claims which would entitle her to relief.

Furthermore:

> Exhibits attached to the pleadings will be considered part of the pleadings for purposes of deciding whether to dismiss or enter summary judgment. Fed Rules Civ. Pro. 12(b)(c), 56, U.S.C.A., First Chicago Corp. Securities Litigation, N.D. Ill., 1991 769 F. Supp. 1444.

Additionally:

> Rule that consideration of extraneous material causes a motion to dismiss to be translated into a motion for summary judgment is mandatory. Cortec Industries, Inc., v. Sum Holding L.P., C.A.2 (N.Y. 1991), 949 F.2d 42, cert. den. 112 S. Ct.

1561, 118 L.Ed.2D 208.

DIVERSITY JURISDICTION

The exhibits attached to the Complaint clearly show that diversity jurisdiction exists. Albert Conti ("Conti"), firmwide executive director lives in Pittsburgh and worked in the Pittsburgh office of Kirkpatrick & Lockhart, a Pittsburgh partnership. Conti traveled to Miami from Pittsburgh to "investigate" the matter. He ratified the dismissal.

Furthermore, Section 1558 Federal Practice & Procedure 32A Am Jur2d states that:

> the facts essential to support federal jurisdiction must appear somewhere in the record, diversity jurisdiction being upheld where the existence of diversity is affirmatively shown by the whole record (Emphasis supplied). Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d90; 94 S Ct. 1683, 71 Ohio Ops 2d 474, later app (CA6 Ohio) 570 F2d 563, cert den 435 US 924, 55 L Ed 517, 98 S Ct 1488; Sun Printing & Publishing Assoc v. Edwards, 194 US 377, 48 L.Ed 1027, 24 S Ct. 696; Robertson v. Cease, 97 US 646, 24 L. Ed. 1057.

AMERICANS WITH DISABILITIES ACT OF 1990

The exhibits further show that Appellees knew that the Americans With Disabilities Act

("ADA") had become law. In fact, the Washington office of Kirkpatrick & Lockhart analyzed the law in detail and requested that they get ready to comply with its provisions. The ADA became law in 1990. It is the provisions section of the law that Appellees are trying to use as refuge to circumvent the intent and substance of the law. Additionally, Chapter 11-A of the Dade County Code, As amended is the mirror reflection of the federal law and was in effect at the time of Appellees' malicious, discriminatory and retaliatory employment discharge.

FREEDOM OF SPEECH

This Court has jurisdiction under the stare decisis principle. The Supreme Court of the United States already ruled on the freedom of speech issue between private parties relative to employer/employee situation in Sheet Metal Workers International Ass'n v. Lynn, 1989, 109 S. Ct. 639. In this case, the employee was dismissed in retaliation for his speaking up against a raise in union dues. In my case, I

was fired in retaliation for my questioning Regina why she was being so abusive. I did not exercise my freedom of speech frivolously or disrespectfully. I exercised it because Regina's harassing tactics were driving me crazy and I desperately needed the job.

Furthermore:

> Where employee discharge complaint alleged, in good faith, constitutional violations and claim involved more than $10,000.00, requirements for federal jurisdiction were satisfied. U.S.C.A. Sacs. 701(b)(a)(d), 702, 7703(b)(1); 28 U.S.C.A. Sec. 1983. James Walker v. Walter F. Washington, 627 F2d 541 (1980).

THEREFORE, this court properly has jurisdiction, and the Court erred in dismissing this claim.

CONCLUSION

The workplace as its name implies, is a place to work. It is not a place to carry on extramarital or sexual affairs, especially when they violate employees' constitutional rights.

Furthermore, Respondents intentionally violated their oath to the Bar and further violated Rule 11 by engaging in harassing

tactics and refusing to comply with the Rule requiring the parties to meet to exchange documents and negotiate settlement. Respondents' attorney affixed his signature to the documents when he himself knew that I had been wronged and that Appellees had maliciously violated the law. The record evidences the harassing tactics and lack of professionalism.

IT IS TIME TO USE PUNITIVE/EXEMPLARY DAMAGES TO HELP THE HOMELESS, THE ABUSED CHILDREN AND THE RED CROSS. (Appendix I, a34-a35).

It is unconscionable that the very same people who swore to uphold justice are perpetrating injustice.

I respectfully reiterate my request to enter summary judgment as follows:

Punitive/exemplary damages in the amount of $21 million to be distributed as follows:

$7 million to Camillus House;

$7 million to Children First; and

$7 million to the Red Cross; and

compensatory damages to me in the amount of $1 million.

WHEREFORE, for the reasons set forth above, a writ of certiorari should issue to review the order of dismissal for failure to state a cause of action in this matter.

DATED: May 28, 1993.

Gloria Kelley, Pro Se
10564 S.W. 112 Avenue
Miami, FL 33176
(305) 279-5785

Gloria Kelley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-2271-CIV-NESBITT

GLORIA KELLEY,

Plaintiff,

VS.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court on the following pretrial matters in this case. Upon review of the motions identified below, all responses and replies thereto, the Court file and applicable law, it is hereby ORDERED AND ADJUDGED as follows:

a. Plaintiff's Motion to Strike Defendants' Motion to Dismiss the Complaint and Motion for Sanctions filed on October 29, 1991 is DENIED as MOOT by virtue of the filing of the amended complaint.

b. Plaintiff's Emergency Motion to

Expedite Discovery filed on October 29, 1991 is DENIED, the Court finding no basis for expedited discovery at this stage of the litigation.

c. Plaintiff's Renewed Motion to Strike Defendants' Motion to Dismiss the Complaint, Motion for Sanctions and Emergency Motion to Expedite Discovery filed on November 8, 1991 is DENIED for the above stated reasons.

d. Plaintiff's Third Renewed Motion to Strike Defendants' Motion to Dismiss the Amended Complaint and Motion for Sanctions filed on December 23, 1991 is DENIED, the Court finding Defendants' motion is neither redundant, immaterial, impertinent or scandalous as to warrant striking.

e. Plaintiff's Motion for Evidentiary Hearing filed on December 23, 1991 is DENIED, the Court finding the issues involved in this lawsuit do not necessitate an evidentiary

hearing at this time.

DONE AND ORDERED at Miami, Florida, this 31st day of January, 1992.

Ted E. Bandstra
U.S. Magistrate Judge

cc: Dennis A. Nowak, Esq.
Gloria Kelley, pro se

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF FLORIDA
CASE NO. 91-2271-CIV-NESBITT

GLORIA KELLEY

Plaintiff,

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., and REGINA MARCH, etc.,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on Defendants' Motion to Dismiss Amended Complaint filed on December 17, 1991.[1] Previously, this case was referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Lenore C. Nesbitt for the resolution of all pretrial

[1]The undersigned considers defendants' motion to dismiss the complaint filed on October 24, 1991 to be MOOT by virtue of the filing of an Amendment to Plaintiff's Complaint on December 11, 1991. Accordingly, this report and recommendation will not address that motion except to the extent that the grounds asserted therein are still relevant to the instant motion to dismiss.

matters pursuant to 28 U.S.C. 636(b). Having considered this motion, the court file and applicable law, the undersigned recommends that Defendants' Motion to Dismiss Amended Complaint be GRANTED for reasons explained more fully below.

INTRODUCTION

On October 10, 1991, plaintiff Gloria Kelley, proceeding pro se, commenced this employment discrimination action seeding damages against her former employer, Kirkpatrick & Lockhart, P.A. ("K & L"); Brian Foremny, a partner of K & L, and Regina March, the office administrator of K & L (collectively referred to as "defendants" herein) for, inter alia, alleged statutory and constitutional violations arising out of plaintiff's discharge from employment with K & L as a legal secretary. Specifically, plaintiff's original complaint asserts claims for discrimination under the Americans with Disabilities Act of 1990 ("ADA") (Count I), violation of constitutional right of freedom of

speech (Count II), intentional infliction of emotional distress (Count III), breach of implied contract (Count IV), damage to reputation (Count V) and ratification of discriminatory firing (Count VI).

On December 11, 1991, plaintiff filed a pleading captioned "Amendment to Plaintiff's Complaint" in which she purports to add the Florida state law claims of tort of retaliatory discharge (Count VII) and breach of duty (Count VIII) to her original complaint.

On December 17, 1991, defendants filed the instant motion to dismiss the amended complaint for failure to state a claim upon which relief may granted under federal or state law.

On January 27, 1991, defendants supplemented their motion with the filing of an additional memorandum of law in support thereof.

STANDARD OF REVIEW

Motions to Dismiss under Fed.R.Civ.P. 12(b) are addressed to the allegations of the complaint which must be liberally construed in

favor of plaintiff and accepted as true. *Jenkins v. McKeithen*, *395 U.S. 411, 421 (1969)*; Bracewell v. Nicholson Air Services, Inc., 680 F.2d 103, 104 (11th Cir. 1982); First American Bank & Trust By Levitt v. Frogel, 726 F. Supp. 1292, 1293 (S.D.Fla. 1989). Thus, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claims which would entitle her to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985).

CONCLUSIONS OF LAW

A. Discrimination under the Americans with Disabilities Act of 1990 (Count I)

Defendants move to dismiss plaintiff's claim for discriminatory firing under the ADA on the ground that this Act does not become effective until July 26, 1992 so that plaintiff cannot state a claim under the ADA for an alleged discriminatory firing which occurred on or about March 26, 1991. In addition,

defendants seeks dismissal of this discrimination claim for plaintiff's failure to exhaust her administrative remedies as required by the ADA and its enforcement procedures set forth in 42 U.S.C. Sec. 2000e-5.

The recently enacted Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12101 et seq. ("ADA") establishes a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" in the terms and conditions of their employment.[2] 42 U.S.C. Sec. 12101(b). The ADA applies to employers of twenty-five or more employees within industries affecting commerce. 42 U.S.C. Sec. 12111(5)(a). However, the ADA is inapplicable to plaintiff's discrimination claim because the enforcement provisions of the Act do not become effective until July 26, 1992. 42 U.S.C. Secs. 12111, 12117 and 12133; Pub. L.101-336, Title I, Sec.

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[2]Plaintiff's alleged disability appears to be a heart condition. See Complaint, Exhibit C.

108, 104 Stat. 337 (providing that the coverage section of the ADA is effective 24 months after July 26, 1990); see also, Moore v. Sun Bank of North Florida, N.A., 923 F.2d 1423, n.2 (11th Cir. 1991).

Accordingly, the undersigned finds that plaintiff's discrimination claim under the ADA (Count I) should be dismissed for failure to state a cause of action because the Act is currently unenforceable. Because the Act is not yet enforceable, the undersigned finds it unnecessary to address the issue of whether plaintiff has exhausted her administrative remedies under the Act.

B. Freedom of Speech Claim (Count II)

Defendants next move to dismiss Plaintiff's claim for violation of her constitutional right of freedom of speech (Count II) due to the absence of any state action under the circumstances of this case. Count II of the Amended Complaint alleges that plaintiff was discharged in retaliation for asking defendant

Regina March, "why she was using plaintiff as a punching bag." Cpt. para. 28. Defendants correctly note that even if this allegation was sufficient to demonstrate a restriction by defendants on plaintiff's speech, it is insufficient to support a cognizable cause of action against defendants since the First Amendment ordinarily prohibits governments, not private individuals, from abridging free speech. See NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) (first amendment prohibits governments from abridging free speech); R.C. Maxwell co. v. Borough of New Hope, 735 F.2d 85, 87 (3rd Cir. 1984) (first amendment considerations are not ordinarily implicated where private actors restrict speech). In fact, the first amendment has been held to guarantee private actors the right to make such restrictions. See R.C. Maxwell Co., at page 87, citing Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029.

Here, plaintiff's complaint is devoid of any allegations indicating that the government

played a role in defendants' decision to discharge plaintiff from K&L. Finding no authority requiring private individuals to respect other individuals' rights of free speech, the undersigned concludes that Count II should be dismissed for failure to state a claim against Defendants, a private law firm and two private individuals.

Conclusion

Having found that Counts I and II of plaintiff's amended complaint fail to state a cause of action, the undersigned further finds that this Court has been divested of its jurisdiction over plaintiff's remaining pendant state law claims. Accordingly, the undersigned finds it unnecessary to address these claims. In summary, the undersigned recommends that defendants' motion to dismiss the amended complaint be GRANTED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Lenore C. Nesbitt, United

States District Judge, within ten (10) days of receipt. See 28 U.S.C. Sec. 636(b)(a)(C); United States v. Warren, 687 F.2d 347 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); and Hardin v. Wainright, 678 F.2d 589 (5th Cir. Unit B 1982); See also Thomas v. Arn, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED in Miami, Florida, this 31st day of January, 1992.

Ted E. Bandstra
U.S. Magistrate Judge

Copies furnished to:

Honorable Lenore C. Nesbitt
Dennis A. Nowak, Esq.
Gloria Kelley, Esq .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-2271-CIV-NESBITT

GLORIA KELLEY

Plaintiff,

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.

Defendants.
_____/

ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Report and Recommendation of Magistrate-Judge Ted E. Bandstra. After due consideration of the objections submitted by Plaintiff and the response to Plaintiff's objections submitted by Defendants, it is

ORDERED AND ADJUDGED that the Magistrate-Judge's Report and Recommendation of January 31, 1992 is AFFIRMED and Defendants' Motion to

Dismiss the Amended Complaint is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of June 1992.

Lenore C. Nesbitt
U.S. DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-4556
Non-Argument Calendar

D.C. Docket No. 91-2271-CIV-LCN

GLORIA KELLEY, Ex-employee,

Plaintiff-Appellant,

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before FAY, DUBINA, and BLACK, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Gloria Kelley appeals from the district court's order dismissing her complaint for failure to state a cause of action. We review the district court's order de novo in order to determine whether there exists any set of facts that would entitle Kelley to

relief.

Kelley was discharged from her secretarial position with Kirkpatrick & Lockhart, P.A., on April 12, 1991. In October 1991, Kelley filed a pro se complaint alleging discrimination under the American with Disabilities Act of 1990, unconstitutional violation of her freedom of speech, intentional infliction of emotional distress, breach of implied contract, damage to reputation, and ratification of discriminatory firing. A December 1991 amendment to the original complaint added state law claims of retaliatory discharge and breach of duty.

The district court adopted the magistrate judge's report and recommendation and granted the Defendants' motion to dismiss. The court determined that Kelley had not stated a cause of action on her federal claims, thereby divesting the district court of jurisdiction to hear her pendent state law claims. We agree. No set of facts exist that would entitle Kelley to relief. Kelley failed to state a cause of action, and

the pendent state law claims were properly dismissed. AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4556

GLORIA KELLEY, ex-employee,

Plaintiff-Appellant

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.

Defendants-Appellee

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: FAY, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

FILED: May 13, 1993

Constitutional tort. Every person who under color of any statue, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. Sec. 1983.

BLACK's LAW DICTIONARY

KIRKPATRICK & LOCKHART -- EMPLOYMENT ISSUES
WINTER 1990-91

AMERICANS WITH DISABILITIES ACT: WHO IS DISABLED?

The Fall, 1990 **Employment issues** contained an insert in which we reviewed the Americans With Disabilities Act, outlining not only its employment provisions but also the other provisions of the Act. With this issue we begin a series of articles focusing on the employment aspect of the Act. The Act became law on July 26, 1990, and its employment provisions become applicable to employers with twenty-five or more employees on July 26, 1992. Six months have already elapsed, and the Act becomes effective approximately eighteen months from now. It is our hope that this series of articles will not only enable our readers to become familiar with the Act, but also encourage them to begin advance preparation for compliance with the Act, rather than waiting until the last moment.

Key to the Act is the definition of "disability": The term "disability" means with

respect to an individual -

- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

- a record of such an impairment; or

- being regard as having such an impairment.

A disability thus requires both an impairment and a substantial limitation on one or more major life activities as a result of the impairment.

The Senate and House reports clearly state that Congress used and relied upon the definition of the term disability contained in Section 504 of the Rehabilitation Act of 1973 and on the regulations issued under that legislation by the then Department of Health, Education, and Welfare ("Regulations"). It is also clear there is no definite and exhaustive list of disabilities, but rather each situation must be reviewed individually.

The Regulations define a physical

impairment as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: neurological; musculo skeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine." A mental impairment is "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

These definitions are broad, and are intended to be so. The House report on the Act contains a partial list of conditions considered as disabilities: orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; infection with the Human Immunodeficiency virus; cancer; heart disease; diabetes; mental retardation; mental illness; specific learning disabilities; drug addiction;

and alcoholism.

...if the applicant or employee can show something more than a trivial limitation, the burden will be on the employer to persuade a court that the disability does not affect a major life activity.

Although the list is long and very inclusive, it does not include very minor physical or mental limitation. There is a second part of the definition of disability which states that the impairment must substantially limit one or more of the individual's major life activities. The Regulations define major life activity as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities. Persons with minor impairments do not fit the definition. A person is considered as limited

when they are deficient in comparison to most people. Moreover, it is clear that the comparison must be made without regard to the availability of mitigating measures. Thus, a person who is hard of hearing is disabled even though the loss may be corrected through the use of a hearing aid.

Although the emphasis must be on the facts of each individual case, courts have held that mild cases of cross-eyedness, fear of heights,a chemical imbalance of lithium, and a back problem which did not preclude a person from acting over a period of many years as a mail carrier did not constitute a disability. Given the spirit and intent of the Act, however, it is certain that if the applicant or employee can show something more that a trivial limitation, the burden will be on the employer to persuade a court that the disability does not affect a major life activity.

An employer will not necessarily prevail in a charge of alleged disability discrimination

simply by showing that an applicant or employee does not have a disability. That result occurs because of two other parts of the definition of disability: a record of having had such an impairment OR being regarded as having such an impairment even if the impairment does not exist. Looking first at the issue of having a record of such impairment, this part of the definition protects those who have recovered from a physical or mental disability. Included are persons such as those with histories of mental or emotional illness, heart disease, or cancer. Other examples would be those who in the past have been misclassified as having an impairment such as having been classified as mentally retarded.

The third part of the definition, being regarded as having an impairment, in some cases overlaps the second, but whether failing under the second or third part of the definition, discrimination is prohibited. By way of example, a person who has a history of epilepsy

but had no seizure nor required medication for many years was held to be regarded as disabled. The third part of the definition was directed toward situations in which the attitudes and prejudices of others were considered. Thus, carrying the HIV or hepatitis B infection, or disfigurement from burns and scars, may not actually affect a major life activity but the prejudices of others may cause a perception of disability, and such persons are protected against discrimination.

Broad as the coverage and definition of disability may be, the Act specifically excludes from protection transvestites, homosexuals and bisexuals, others with certain sexual behavior disorders, compulsive gamblers, kleptomaniacs, pyromaniacs and persons with psycho active substance use disorders resulting from current illegal use of drugs. The issues of alcohol or drug addiction and use will be dealt with in more detail in a subsequent issue as they present specific problems and restrictions.

In summary, the Act's definition of disability is broad and very inclusive, and an employer risks litigation in any instance in which it does not hire or takes some other action or inaction against a person because of an actual or perceived mental or physical problem.

DADE COUNTY CODE SECTION 11A-2 (pgs. 280.28-30)

(Supp. No. 184)

(19) A handicapped person shall mean any individual possessing any physical or mental impairment which substantially limits one or more of that individual's major life activities, including:

(a)(i) Any person who has a record of such impairment, for example in such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, learning and working;

(ii) Any person who is perceived or regarded as having an impairment, or any person having a physical or mental impairment which does not substantially limit one or more major life activities but which is treated by another person as

constituting such a limitation, or a person having none of the impairments defined in this subsection but who is treated by another person as having such an impairment.

(b) Physical or mental impairment includes:

(i) Any physiological disorder, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory, including speech organs, cardiovascular, digestive, genitourinary, circulatory, skin, and endocrine;

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and

specific learning disabilities;

(iii) Any degree of paralysis, epilepsy, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness, speech impediment or persons who rely upon a Seeing Eye dog, wheelchair or other remedial method, appliance or device.

(c) A record of such impairment includes having a history of, or having been misclassified as having a history of physical or mental impairment which substantially limits one or more major life activities.

(21) Reasonable accommodation in employment shall require every employer to make necessary adaptations to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the adaptation

would impose an undue hardship on the operation of its program.

...

(b) In determining whether an accommodation would impose an undue hardship on the operation of an employer's program, factors to be considered include:

(1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) The nature and cost of the accommodation needed.

(c) An employer may not deny any employment opportunity to a qualified handicapped employee or applicant if

the basis for the denial is the need to make a reasonable accommodation to the physical or mental limitations of the employee or applicant.

JUSTICES AGREE TO STUDY LIMITS ON DAMAGE AWARDS

WASHINGTON (AP)

The Supreme Court said Monday it will restudy the constitutional limits on punitive-damage awards.

The justices, diving back into a national debate over skyrocketing jury awards in personal injury cases, agreed to study a West Virgina case in which an oil-and-gas business was ordered to pay $10 million in punitive damages.

The West Virginia Supreme Court ruled that the large award was justified because TXO Production Corp.'s conduct was "**really mean**."

Lawyers for TXO argued that the punitive damages -- 526 times higher than the $19,000 in compensatory damages awarded -- violated the company's constitutional right to due process.

The jury found that **TXO knowingly filed a frivolous lawsuit against another company as leverage** to increase its oil-and-gas rights on a tract of land in McDowell County. (Emphasis supplied) The Miami Herald, Miami, Florida (end of 1992?).[3]

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[3]I have a copy of the newspaper clipping.

CERTIFICATE OF INTERESTED PERSONS

In accordance with Part VII, Practice and Procedure, Rule 29, the following is a list naming all parent companies and subsidiaries: KIRKPATRICK & LOCKHART, a Pittsburgh partnership with offices in:

Boston, Massachusetts

Harrisburg, Pennsylvania

Washington, D.C., and

Miami, Florida[4]

---

[4]A complete listing of the parties having an interest in this lawsuit is attached as "Certificate of Interested Persons, Page C-1 of 1" to Brief of Appellant, Gloria Kelley.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-054

In The

Supreme Court of the United States

October Term, 1993

GLORIA KELLEY,

Petitioner,

vs.

KIRKPATRICK & LOCKHART, a Professional Association consisting of partners engaged in the practice of law, BRIAN FOREMNY, individually and as agent of Kirkpatrick & Lockhart, REGINA MARCH, Office Administrator, individually and as agent of Kirkpatrick & Lockhart, jointly and severally,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY A. TEW, ESQUIRE

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals erred in affirming the District Court's dismissal of Petitioner's Amended Complaint.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned certifies that the following persons or entities have an interest in the outcome of this case:

1. Bandstra, Ted E. – United States Magistrate Judge
   United States District Court
   Southern District of Florida
   301 North Miami Avenue
   Miami, Florida 33128

2. Foremny, Brian – Respondent
   Kirkpatrick & Lockhart
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

3. Kelley, Gloria – Petitioner
   10564 S. W. 112 Avenue
   Miami, Florida 33176

4. Kirkpatrick & Lockhart – Respondent
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

5. March, Regina – Respondent
   Kirkpatrick & Lockhart
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

6. Nesbitt, Lenore C. – United States District Court Judge
   United States District Court
   Southern District of Florida
   301 North Miami Avenue
   Miami, Florida 33128

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT – Continued

7. Jeffrey Allen Tew – Attorney for Respondents
   Kirkpatrick & Lockhart
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

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Sup. Ct. R. 10 3

I. RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondants, Kirkpatrick and Lockhart, Brian Foremny, and Regina March, request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") entered on March 30, 1993.

II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITIONS IN COURTS BELOW

On October 10, 1991, Petitioner Gloria Kelley, proceeding *pro se*, commenced her employment discrimination action seeking damages against her former employer, Kirkpatrick & Lockhart ("K&L"), Brian Foremny ("Foremny"), a partner of K&L, and Regina March ("March"), the office administrator of K&L for, *inter alia*, alleged statutory and constitutional violations arising out of Petitioner's discharge from employment with K&L as a legal secretary.[1] A.5. Specifically Petitioner's original complaint asserted claims for discrimination under the Americans with Disabilities Act of 1990 ("ADA") (Count I), violation of constitutional right of freedom of speech (Count II), intentional infliction of emotional distress

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[1] References to the opinions below, as reprinted in the Appendix to Petitioner's brief, will be in the form A. References to the Record below will be in the form R.

(Count III), breach of implied contract (Count IV), damage to reputation (Count V) and ratification of discriminatory firing (Count VI). A. 6.

On December 11, 1991, Petitioner filed a pleading captioned "Amendment to Plaintiff's Complaint" in which she purported to add the Florida state law tort claims of retaliatory discharge (Count VII) and breach of duty (Count VIII) to her original Complaint.

On December 17, 1991, Respondents filed their Motion to Dismiss Amended Complaint and Memorandum of Law in Support Thereof for failure to state a claim upon which relief may be granted under federal or state law. On January 27, 1992, Respondents supplemented their Motion with the filing of an additional Memorandum of Law in support thereof. A. 6.

On January 31, 1992, United States Magistrate Judge Ted E. Bandstra, pursuant to an Order of Reference dated October 31, 1991, made his Report and Recommendation to the District Court recommending that the Amended Complaint be dismissed. A. 4-12.

On June 8, 1992, United States District Court Judge Lenore C. Nesbitt affirmed Magistrate Judge Bandstra's Report and Recommendation and entered an Order of Dismissal granting Respondents' Motion to Dismiss the Amended Complaint *in toto*. A. 13-14. After Petitioner filed a timely notice of appeal of the dismissal, the Eleventh Circuit affirmed the dismissal in a per curiam opinion. A. 15-17. Petitioner then filed a Motion for Rehearing which was denied on May 13, 1993. A. 18-19.

B. STATEMENT OF THE FACTS

From February 16, 1987 through April 12, 1991, Petitioner was employed by Respondent K&L as a legal secretary. During this period of time, Petitioner worked for two attorneys as did every legal secretary in K&L's Miami office. R1-21.

As a result of her inability to handle the workload generated by the two attorneys for whom she worked (one of whom was Respondent Foremny), Petitioner requested a reassignment in December, 1989. R1-21. In order to accommodate this request, the other attorney for whom Petitioner worked was assigned to another secretary. After January, 1990, Petitioner remained as legal secretary to Respondent Foremny and also served as administrative secretary to Respondent March, K&L's office manager in Miami. R1-21.

Notwithstanding the reduction in her workload, Petitioner's performance continued to deteriorate until her employment with K&L was terminated on or about March 26, 1991, effective April 12, 1991. R1-21.

Petitioner has alleged that her termination was the result of an unspecified heart condition. If, in fact, Petitioner has a heart condition, this fact was unknown to Respondents and played no part in her discharge. R1-21.

C. STANDARD OF REVIEW

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. Sup. Ct. R. 10. The principal

purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 111 S.Ct. 1854 (1991).

III. SUMMARY OF ARGUMENT

Petitioner has not demonstrated that the dismissal of her Amended Complaint resulted in a conflict among the Circuit Courts of Appeals or state courts concerning the meaning of provisions of federal law. Nor has she shown any special or important reasons for the granting of her petition. On the contrary, the lower courts correctly followed established precedent in dismissing Petitioner's Amended Complaint.

The Amended Complaint filed by Petitioner contained claims for discrimination under the Americans with Disabilities Act of 1990 ("ADA") (Count I), for violation of the constitutional right of freedom of speech (Count II), and numerous Florida state common law claims (Count III through VIII). The parties are non-diverse. Consequently, only Counts I and II can possibly provide a basis for federal jurisdiction.

Petitioner has not, and cannot, state a claim upon which relief could be granted in Count I of the Amended Complaint under the ADA. The event of which Petitioner complains, the termination of her employment with K&L, occurred in excess of 15 months prior to the effective date of the ADA. Therefore, the dismissal of Count I of the Amended Complaint, as recommended by the Magistrate

Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct.

Petitioner has not, and cannot, state a claim upon which relief could be granted in Count II of the Amended Complaint under the First Amendment to the United States Constitution. Even if sufficient facts were alleged to show a restriction of Petitioner's speech by Respondents, a private law firm, one of its partners and its office administrator, Petitioner cannot allege any kind of "state action" necessary to sustain a freedom of speech violation. Consequently, the dismissal of Count II of the Amended Complaint, as recommended by the Magistrate Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct.

Finally, Petitioner's pendant state law claims in Counts III through VIII are non-diverse and offer no basis for federal jurisdiction. Even if diversity of citizenship between the parties did exist, Petitioner has not, and cannot, state a claim upon which relief could be granted under Florida law. Because no federal claim exists, the dismissal of Petitioner's pendent state law claims in Counts III through VIII of the Amended Complaint, as recommended by the Magistrate Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct.

IV. ARGUMENT

A. INTRODUCTION

Petitioner alleges in her brief that the District Court's dismissal of her Amended Complaint for failure to state a cause of action conflicts with several decisions of this Court as well as decisions of the various Circuit Court of Appeals. In fact, a review of the actions of the courts below clearly shows that the dismissal of Petitioner's Amended Complaint was solidly based on established precedent.

B. ADA CLAIM

In her Amended Complaint, Petitioner attempted to state various federal and state law claims against Respondents arising out of the termination of her employment on or about March 26, 1991. In Count I of the Amended Complaint, Petitioner alleged that she was fired from her job as a legal secretary due to the fact that she suffered from an unspecified heart ailment. Termination of her employment on such grounds, Petitioner alleged, is a violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12101 et. seq..

As found by the Magistrate Judge below, however, the ADA does not apply to Petitioner's claim because the effective date of the ADA is July 26, 1992. Pub.L. 101-336, Title I, § 108, July 26, 1990, 104 Stat. 337 (providing that the coverage section of the ADA, 42 U.S.C. §12111, is effective 24 months after July 26, 1990). *See also, Moore v. Sunbank of North Florida, N. A.*, 923 F.2d 1423 (11th Cir. 1991) (explaining that the ADA becomes effective two

years after the date of its enactment, July 26, 1990). Consequently, Petitioner cannot state a claim under the ADA arising from an allegedly discriminatory firing which occurred on or about March 26, 1991. The dismissal of Count I of the Amended Complaint, as recommend by the Magistrate Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct on this basis alone.

Even if the ADA did apply to Petitioner's claim, however, it is clear that the dismissal of Count I of the Amended Complaint was proper because Petitioner has failed to exhaust her administrative remedies.

Specifically, 42 U.S.C. §12117, the enforcement provision of the ADA, incorporates and adopts the procedures set forth in 42 U.S.C. §2000e-5 for claims of employment discrimination under the ADA. It is well settled under 42 U.S.C. §2000e-5 that the timely filing of charges of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") *and* receipt of a notice of right to sue are conditions precedent to the bringing of an action in federal court. 42 U.S.C. §2000e-5(e) and (f); *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989) *citing McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

Petitioner has not alleged, and cannot allege, compliance with these statutory prerequisites. Consequently, even if the ADA was effective at the time of Petitioner's termination, dismissal of Count I of the Amended Complaint was mandated by her failure to exhaust her administrative remedies.

C. FREEDOM OF SPEECH CLAIM

It is impossible to determine from the allegations of the Amended Complaint what it is that Respondents are supposed to have done to stifle or restrict Petitioner's First Amendment right to free speech. Even if sufficient facts were alleged to show such a restriction by Respondents of Petitioner's speech, Petitioner could not state a First Amendment claim against Respondents, a private law firm and one of its partners and its office administrator. "The First Amendment prohibits *governments* from abridging free speech." *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (emphasis supplied) (citations omitted). Consequently, First Amendment considerations are not ordinarily implicated where private actors restrict speech. *R. C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 87 (3rd Cir. 1984). In fact, the First Amendment has been held to guarantee private actors the right to make such restrictions. *Id.* at p. 87, *citing Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976), *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831 (1974). In this case, Petitioner has not alleged, and cannot allege, any kind of "state action" involved in her discharge from Respondent K&L. Therefore, Petitioner cannot state a claim under the First Amendment against any of the Respondents.[2]

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[2] The case cited by Petitioner, *Sheet Metal Workers Int'l. Ass'n v. Lynn*, 109 S.Ct. 639 (1989), is easily distinguishable. In *Lynn*, the employee's cause of action was based on the "free speech" provision of the Labor-Management Reporting and Disclosure Act of 1959. Petitioner can cite no basis for her claim of a violation of her freedom of speech other than the First Amendment.

Morast v. Lance, 807 F.2d 926, 930-932 (11th Cir. 1987). The dismissal of Count II of the Amended Complaint was proper under the well-established precedent of this Court.

D. PENDENT STATE LAW CLAIMS

As demonstrated above, Petitioner failed to state any federal claim against Respondents. Federal question jurisdiction is therefore not present in this action. Because the parties are all citizens of the state of Florida, Petitioner's alleged state law claims are not based upon diversity jurisdiction and the dismissal of Counts III through VIII of the Amended Complaint was proper on this basis alone.[3] Even if Petitioner somehow could establish that her state law claims did have a basis of federal jurisdiction, Counts III through VIII of the Amended Complaint did not state any cause of action against Respondents under Florida law and were properly dismissed.

---

[3] Petitioner argues that diversity jurisdiction is present because Respondent K&L has offices in other states. The statutory provision granting United States District Courts diversity jurisdiction over cases involving citizens of different states, 28 U.S.C. § 1332, has been held to require a complete diversity of citizenship between parties. *Newman-Green, Inc. v. Alfonso-Larrain*, 109 S.Ct. 2218 (1989) (holding that when a plaintiff sues more that one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for each defendant or face dismissal). It is undisputed that Petitioner and Respondents Foremny and March are citizens of Florida.

1. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Count III of the Amended Complaint, Petitioner alleged that Respondent March denied Petitioner's request for a transfer and "gave additional work to [Petitioner] every opportunity she had." Amended Complaint ¶45. Even if true, which is denied, this action is not the kind of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" necessary to state a claim under Florida law for intentional infliction of emotional distress. *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277, 279 (Fla. 1985). The dismissal of Count III of the Amended Complaint was therefore proper both on the basis of lack of jurisdiction and under Florida substantive law.

2. BREACH OF IMPLIED CONTRACT

In Count IV of the Amended Complaint, Petitioner alleged that she was damaged as a result of an alleged breach of an "implied contract" between Respondents Regina March, Brian Foremny and Respondent K&L. Amended Complaint ¶¶66-67. Petitioner does not set forth the material terms of this supposed contract or how it is she has any rights under it. Respondents were not able to locate any Florida case allowing recovery in such circumstances, nor has Petitioner provided any support for her cause of action. The dismissal of Count IV of the Amended Complaint was therefore proper both on the basis of lack of jurisdiction and under Florida substantive law.

3. DAMAGE TO REPUTATION, RATIFICATION OF DISCRIMINATORY FIRING, TORT OF RETALIATORY DISCHARGE AND BREACH OF DUTY

In Counts V through VIII of the Amended Complaint, for "Damage of Reputation," "Ratification of Discriminatory Firing," "Tort of Retaliatory Discharge" and "Breach of Duty" appear to be based upon Petitioner's alleged employment discrimination claim in Count I of the Amended Complaint. As such, Counts V through VIII were properly dismissed based on the reasoning discussed above at Section IV(B) of this brief. In any event, Respondents have been unable to discern any Florida state law claim alleged in Counts V, VI and VII. The dismissal of these Counts was therefore proper both on the basis of lack of jurisdiction and under Florida substantive law. To the extent that Count VII could be construed to state a claim under Florida law, its dismissal should be affirmed for lack of subject matter jurisdiction.

E. DISMISSAL OF PETITIONER'S COMPLAINT FOLLOWED WELL-ESTABLISHED PRECEDENT

As discussed above, the dismissal of Petitioner's Amended Complaint followed the well-established precedent of this Court. The rulings and reasoning of the lower courts did not conflict with any opinions of this Court or the various Circuit Courts of Appeals. Furthermore, Petitioner has failed to show any special or important reason for this Court to expend its resources reviewing the dismissal of the Amended Complaint.

V. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Gloria Kelley's petition for writ of certiorari be denied.

Respectfully submitted,

JEFFREY A. TEW, ESQUIRE

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Attorneys for Respondents

Supreme Court, U.S.
FILED
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(3)

No. 93-54

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GLORIA KELLEY, EX-EMPLOYEE,

Petitioner (PRO SE)

VS.

KIRKPATRICK & LOCKHART, a professional association consisting of partners engaged in the practice of law, BRIAN FOREMNY, Partner, Individually and as agent of KIRKPATRICK & LOCKHART, REGINA MARCH, Office Administrator, individually and as agent of KIRKPATRICK & LOCKHART, jointly and severally,

EX-EMPLOYER, Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. PETITIONER'S REPLY TO BRIEF IN OPPOSITION

In support of my Reply to Brief In Opposition, I state as follows:

1. In a good-faith attempt at settling this matter out of court, I provided all my exhibits/evidence to Respondents. My main objective in providing Defendants all my exhibits prior to filing the lawsuit was to prove to them that I have a legitimate claim and to encourage settlement. I wanted to save time, money and the Court's valuable time. However, when faced with the overwhelming and compelling evidence, Respondents and their attorneys acted in bad-faith and forced me into the courts. Respondents' main objective was to obstruct justice and to deny me access to the courts, as is clearly evident from the review of the record. They knew full well that I did

not and do not have the financial means to pay an attorney. They also knew that they could manipulate the rules of procedure to work against me. They abused the rules of procedure to harass me and wear me down.

2. Former state Supreme Court Chief Justice, Alan Sundberg chaired the commission to study, among other things, the administration of the legal system. He found that:

> 'a common thread was lack of professionalism,' and that the pretrial discovery procedures have been used as a burdensome device and to bankrupt the other side--that the attorneys' aim has been to win at all costs, and that litigation is war rather than the search for the truth. Former Justice Alan Sundberg said that the Courts should do more to curb such disputes. "Curb 'Rambo' Litigators, Panel Says," The Miami Herald, February 1993 (approximately).[1]

3. Additionally, Fred Grimm, a writer for the Miami Herald, stated in his

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[1] I am not sure of the date as I forgot to note it.

article that:

'attorneys as hired thugs' have been using the law as a 'blunt instrument'...access to government is a basic right that ought to be nearly immune to such tactics. But corporate lawyers, who use lawsuits like fill dirt to bury citizen opposition, tend to forget the little niceties of democratic government. "Suits Camouflage Brute Intimidation," The Miami Herald, August 16, 1992, p. 7B.

4. When I provided Respondents all my material relevant to the issues and proving the merits of my case, little did I know that one of the most important amendments proposed by Federal Judge William Schwarzer, Director of the Federal Judicial Center requires:

all parties to a lawsuit to disclose at the early stages of a case any material that is relevant to the issues. In the ensuing discussion, panel members elaborated on at least two advantages to this rule change: such mandatory disclosure of relevant material could first curtail the use of interrogatories and document requests, and thus reduce one of the most significant expenses of litigation; and second, enable both sides to evaluate the merits of their cases much sooner, and thus, encourage earlier settlement. (Emphasis supplied). "It's a

Matter of Ethics: Responsible Practice In An Increasingly Competitive World," The Florida Bar Journal, February 1993.

THE ISSUE OF HARASSMENT, ABUSE OF JUDICIAL PROCESS, USE OF THE LAW AS A BLUNT INSTRUMENT AND DENIAL OF ACCESS TO THE COURTS IS ***THE VORTEX UPON WHICH THIS CASE SPINS, AND UPON WHICH OUR DEMOCRACY SPINS OUT OF CONTROL.*** THE POWERFUL AND ABUSIVE ATTORNEYS HAVE A CHOKEHOLD ON THE COURT SYSTEM **WHICH MUST BE BROKEN**. OUR GOVERNMENT IS A GOVERNMENT **OF** THE **PEOPLE**, **FOR** THE **PEOPLE** AND **BY** THE **PEOPLE**. OUR GOVERNMENT IS NOT A GOVERNMENT OF THE POWERFUL AND ABUSIVE GROUPS. **WE ARE LOSING OUR DEMOCRACY**.

5. Further, the trial court was bound to review all the exhibits attached to the Complaint, Conley v. Gibson, 355 U.S. 41, 45-46 (1957) and translate Respondents' Motion to Dismiss into a motion for summary judgment. First Chicago Corp.

Securities Litigation, N.D. Ill., 1991 769 F.Supp, 1444; Cortec Industries, Inc. v. Sum Holding L.P., C.A. 2 (N.Y. 1991), 949 F.2d 42, cert. den. 112 S.Ct. 1561, 118 L.Ed.2d 208. In fact, In Conley, id. at page 48, the Supreme Court states:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. (Emphasis supplied).

6. Finally, I am entitled to summary disposition of my appeal because the merits are so clear as to justify expedited action. Walker v. Washington, 1980, 627 F.2d 541, 201 U.S.App.D.C. 82, certiorari denied 101 S.Ct. 532, 449 U.S. 994, 66 L.Ed.2d 292;

AND

Where time is of the essence in appeal because important public policy issues are involved or where rights delayed are rights denied or one of parties is clearly right as a matter of

law so that there can be no substantial question as to outcome of the case, summary disposition of appeal is proper (Emphasis supplied) Groendyke Transport, Inc. v. Davis, C.A. Tex. 1969, 406 F.2d 1158, certiorari denied 89 S.Ct. 1628, 394 U.S. 1012, 23 L.Ed.2d 39.

WHEREFORE, Certiorari must be granted and summary judgment entered in my favor. To do otherwise would be manifest injustice and would send the wrong message to the attorneys that it is okay to abuse the judicial process to harass claimants and deny them access to the courts.

II. REBUTTAL TO BRIEF IN OPPOSITION

ADA CLAIM:

I did exhaust my administrative claims. I filed the right-to-sue letter ("Letter") on December 3, 1991. The Letter was issued by the Dade County Equal Opportunity Board which is the local agency handling discrimination complaints and working in concert with the EEOC.

DIVERSITY JURISDICTION

KIRKPATRICK & LOCKHART ("K&L") is a Pittsburgh partnership. K&L is a Defendant in the case. Albert Conti, agent of K&L traveled from Pittsburgh to Miami and ratified the dismissal. There is complete jurisdiction.

FREEDOM OF SPEECH

In Sheet Metal Workers Int'l. Ass'n v. Lynn, 109 S.Ct.639 (1989), the amendment to the LMRDA was 'aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution, at page 643 (Emphasis supplied). I never signed any agreement giving up my constitutional right to free speech. I was never told that in order to keep my job I had to subject myself to psychological cruelty, or that I was not supposed to question why I was treated abusively.

Additionally, the LMRDA 'was the product of congressional concern with widespread abuses of power by union leadership.' Id. at p.643. The widespread abuses of power has spread further in the private sector[2]. The private employer has become a quasi-government. It controls our lives and our health. See "Toil and Trouble: Crisis in the American Workplace," by Elinor J. Brecher, The Miami Herald, March 21, 1993; St. Paul Fire and Marine Insurance Company's American Workers Under Pressure, study by Stacey K. Kohler, Ph.D., Organizational Psychologist, Study Coordinator, (1992).

Furthermore, private employers and/or their agents have become very abusive. They hide behind "legal" tactics to

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[2]The union is private sector.

effectuate harassment, intimidation and humiliation. They negatively exercise their economic power over the hard-working employee who is doing the utmost to earn his/her living. AND THEN WE WONDER WHY THERE IS SO MUCH MENTAL ILLNESS. Through their abuse of economic power over the employee, the private sector is violating our constitutional right to pursue our happiness which can only be achieved by earning our living.

All the employer has to do is say: this is a right-to-work state. We can hire and fire at will. That is their <u>license</u> to harass, abuse, intimidate and kick us like dogs. We are human beings, entitled to our dignity. The U.S. Constitution protects my right to the pursuit of happiness through labor. The right to follow any of the common occupations of life is an inalienable

right guaranteed by the Declaration of Independence under the phrase "pursuit of happiness." Allgeyer v. Louisiana, 165 U.S. 578 (1897).

CONCLUSION

WHEREFORE, I respectfully reiterate that Certiorari must be granted and summary judgment entered in my favor. To do otherwise would be manifest injustice and would send the wrong message to the powerful and abusive attorneys that it is okay to abuse the judicial process to harass claimants and deny them access to the courts.

RESPECTFULLY SUBMITTED,

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DATED: August 16, 1993 Gloria Kelley